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No. 95-1327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE CARGILL, INCORPORATED,
Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

Respondents rely primarily on a series of factual contentions -- all to the effect that petitioner's attorneys failed to act in some way, and at some time, to initiate, properly to react to, properly to communicate as to, and properly to seek review of, actions of the district judge that violated both the disqualification provisions of 28 U.S.C. § 455(a) and the waiver provisions of § 455(e). (Canon 3 of the Code of Judicial Ethics, notably, is not mentioned in respondents' brief.)

These contentions are erroneous and implausible, but more importantly, they represent a viewpoint antithetical to the rationale underlying § 455 and Canon 3. Because this viewpoint is reflected in the majority opinion below, it has the potential to foster the erroneous disposition of important issues arising in the sensitive area of judicial ethics.

Section 455 was enacted, and Canon 3 was adopted, for the very purpose of addressing the problems raised by *ineffective* responses of lawyers in just these situations. Indeed, the premise underlying Congress' adoption of § 455 was that counsel, by reason of the judge's power to affect counsel's interests, might agree to a judge's sitting, accommodate the judge's explanations, avoid offensive inquiries, and otherwise find ways to circumnavigate confrontation. Congress' response to these concerns was not to underscore the responsibilities of the attorney. Instead Congress enacted a series of protections that place responsibilities on the judge, involving *sua sponte* recusal and specific prerequisites for "waiver," including the *direct* involvement of the client -- all of which are simply ignored in respondents' brief and discounted in the majority opinion below.

Because the enactment of § 455 itself was impelled by the vignettes, set forth in the legislative history, that illustrated the inherent pressures on counsel, it is particularly relevant to examine the factual contentions made by respondents in light of the concerns raised by Congress and the Judicial Conference:

(1) Respondents first note that at the January 12, 1994 hearing, Petitioner was represented by "experienced litigators" who did not lack "legal competence" (Respondents' Brief in Opposition ("R. Br.") at 11); that local counsel "did not seek any further detail before he stated that *his client* had no

objection" (R. Br. at 12, emphasis added);[1/] that the judge did not "prevent" counsel from conferring with the client (R. Br. at 12); that counsel "voluntarily and unequivocally stated that there was no objection" (R. Br. at 14); that if "petitioner has any dispute as to the adequacy of this representation . . . it must take up those issues with its former counsel" (R. Br. at 13); and that "a party is bound by the actions and decisions of its counsel." (*Id.*)

In contrast, the history underlying the Canon and § 455 makes clear that, *ab initio*, the conduct of counsel in the presence of the judge in such situations is presumed to be compromised and ineffective. (*See* Petition for Writ of Certiorari ("Cert. Pet.") at 12-17.) As a result, § 455 allows no waiver except by a "party"; and the Canon, more explicitly, states that there can be no waiver unless the "party" is involved and that the process must take place outside the presence of the court. App. 9a. These provisions do not allow a trial judge to accept an attorney's "waiver" and then require the client to remediate the judge's statutory violation by taking the initiative to contact the judge if it should wish to challenge his or her impartiality. Indeed, imposing such a requirement would place the client in the position of directly challenging the judge -- a circumstance to be avoided even more than that of having the lawyer do so. In contrast, the intent underlying § 455(e) and Canon is that the judge remain unclear as to the source of any reluctance to endorse his or her continuing to preside. (*See* Cert. Pet. at 13, 15.)

1/ Local counsel did not state that his "client" had no objection (Appendix ("App.") 35a); however, it is significant that the statute requires waiver by the client, 28 U.S.C. § 455(e), that none was obtained, and that respondent felt the need to make it seem that there had been one.

(2) Respondents next note that petitioner's local counsel called petitioner's antitrust counsel just after the conference and communicated the events (including the judge's disclosure, the so-called "waiver," and the subsequent announcement by the judge that he intended "to be in a position to file" a decision on the pending motion to dismiss in a "week or so" (R. Br. at 15, see App. 36a); that prior to the decision on the motion to dismiss, no notice was received that petitioner was disputing the so-called "waiver"; and then, only on February 13, 1994, did petitioner provide a letter to the Court indicating the need for recusal and for withdrawal of the opinion. (R. Br. at 15.) "Petitioner had ample opportunity to communicate . . . with the clerk at least to put the court on notice" that it wished to consider revocation of the "waiver." (*Id.*) Petitioner "chose to remain silent for several weeks." (*Id.*) "Petitioner need not have filed a complete brief immediately; it needed to only notify the court that there was an issue . . ." (*Id.*) "Petitioner has never even alleged . . . that it decided to move for recusal prior to receiving the January 19, 1994 decision." (R. Br. at 16.)

Conspicuously absent from respondents' account is the role and welfare of the "party," Cargill. That party exclusively under § 455(e), and explicitly under Canon 3, should have been involved before any claim of "waiver" even arose. Inclusion of the "party" and its welfare dramatically changes the story and its implications. Because both the trial judge and respondents' counsel had withheld knowledge of their privileged relationship for several weeks, there was no advance notice to Cargill -- even the January 12 hearing was called without giving notice of its subject matter. In the rush thereafter created by the failure to give advance notice, the misprocured "waiver" and the judge's subsequent announcement that the opinion might soon be rendered, the party could not be contacted until the afternoon of Friday, January 14, and then not at a time when

it could obtain advice. (App. at 98a.) Further, because of the foregoing facts, the client's situation had been greatly complicated. It was unclear whether its rights had already been preempted by the actions of local counsel, under circumstances in which he properly should not have been required to act at all. It was unclear whether the unsettling reaction felt with regard to the judge's special relationship with the Petruccelli firm was supported by legal authority. The client was nevertheless, according to respondents, called upon to initiate a communication to the judge that it was uncomfortable with his integrity.

The suggestion in respondents' brief that, at the least, the clerk of the court should have been notified in this short interval is the very *first* time respondent has made that proposal in the two years that this matter has been pending. It is obviously based upon petitioner's *own* research into procedures suggested by the Judicial Conference and the 5th Circuit Court of Appeals for dealing with the delicate issue of waiver (but in *less* strained circumstances -- *i.e.*, where the party's own counsel has not already been drawn into an improper "waiver"). This information about the law of disqualification, including the suggestions for dealing with the problems generated by the trial judge's actions, was pulled together well after the short window of time relevant to the events in this case.

Indeed, the flaw in respondents' contention that there was some wrong in petitioner's communicating its position to the judge on February 13, 1994 (R. Br. at 15) is that the *short* elapsed time arose from efforts to act *responsibly*. If petitioner had objected on January 18 or January 20, 1994, it would presumably fare better under respondents' argument. (R. Br. at 15.) However, petitioner would have had to do so without conducting any responsible inquiry into its rights, which were

problematical given the complexities that the judge's violations of the statute had engendered. Respondents are entirely correct in stating that petitioner does not assert that before January 19, 1994 petitioner had "*decided* to move for recusal" (R. Br. at 16), because it would have been an extremely high-risk decision without an informed basis. Instead, petitioner asserts that following the first substantial communication with its client on January 18, counsel undertook to pursue the disqualification matter given the complicated circumstances involved. (App. 95a-96a.)

Notably, all of these *judge-engendered* difficulties occur in circumstances in which the judge's failure to follow disqualification procedures also has the effect of undermining relationships fundamental to the conduct of the case. The initial problem that § 455 addresses is not only the judge's apparent conflict, but also counsel's conflict of interest that arises when a judge creates a situation of direct interaction with counsel on the matter of his or her disqualification and waiver. The lawyer's relationship with the court may be sufficiently important to the lawyer's professional career that it interferes with his or her assessment of the client's possible need to object to the judge's presiding. The attorney-client relationship, however, suffers an even greater strain once counsel is improperly drawn into such a "waiver," because there is a natural and understandable tendency to defend what has been done. That fact compromises further counsel's ability to give the disinterested advice needed by the client regarding the trial judge's actual predisposition, given the appearance of partiality. These additional difficulties result directly from the

judge's violations of the statute and would not be present if the rules had been followed.[2/]

(3) Finally, respondents contend that counsel also acted improperly in waiting to file the petition for mandamus until the district judge had declined to give the Court of Appeals an opportunity to review his controversial antitrust standing decision by certifying the decision under 28 U.S.C. § 1292(b). (R. Br. at 16-17.) Respondents omit to state that there was guidance in the First Circuit to the effect that an *alternative* to recusal might be found in just such a certification. (When a judge is "embarrassed by a claim of bias made while he sits, he can certify the case for interlocutory appeal under 28 U.S.C. § 1292(b)" even though he regards the claim of bias as insufficient. *In Re Union Leader Corp.*, 292 F.2d 381, 384 n.3 (1st Cir. 1961).) If there is anything more odious to a practicing lawyer than having to move for recusal of the judge presiding over a matter, it is seeking a petition for mandamus to compel the judge's disqualification. Petitioner followed the First Circuit's proposal here as an alternative that offered possible avoidance of that kind of confrontation.

Thus, the types of arguments that are made by respondents -- and reflected in the majority opinion below -- are the reasons why a writ of certiorari should be granted in this case. Together, they endorse a manner of dealing with the matters involving judicial integrity that is damaging to the

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2/ Cargill's local counsel was unable to participate further. (App. 81a.) Respondents assert that petitioner must "take up" this matter with "its former counsel." (R. Br. at 13.) It was, however, the judge's violations of statute that created the pressures that both initially and ultimately compromised the position of local counsel.

system because it undermines the appearance of judicial impartiality and is contradictory to § 455 and Canon 3.

A few additional points merit attention:

1. Respondents argue, without citation, that the "cases are undivided" in supporting their position that the Petruccelli law firm's relationship with the district judge created no appearance of partiality that would require the judge to recuse. That position is just erroneous. (R. Br. at 11.) There are no cases supporting it. (*See* Cert. Pet. at 3 n.3.)

2. Absent from respondents' brief is even a single mention of Canon 3 of the Code of Judicial Ethics. Respondents' implicit argument that the Canon should be ignored strongly suggests that respondents' position lies very far from the respected consensus on judicial ethics embodied in the Canon.

3. Respondents have advanced not a single argument that would support the bizarre result of deferring this significant matter until the ultimate appeal of this case. (*See* Cert. Pet. at 18-20.)

4. Respondents do not deny that there is a conflict among the circuits.

CONCLUSION

Here, both the majority opinion and Judge Campbell's dissent in the court of appeals indicate that the trial judge should *not* have continued to sit and that petitioner had the right to the judge's disqualification. However, respondents and the majority opinion contend, ironically, that the judge's *failure* to adhere to either 28 U.S.C. § 455 or Canon 3 of the Code of Judicial Ethics has deprived petitioner of that right. The

majority opinion would return the case -- still in its initial stages -- to a judge that concededly should not continue to sit. Such an action would subvert the rules developed to address this extremely important area. Accordingly, the Court should review this case to establish a different course for this and future dispositions.

Respectfully submitted,

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